No. 15,653

IN THE

United States Court of Appeals

For the Ninth Circuit

HARRY T. VON EICHELBERGER and
HAIG MIHRAM TERZIAN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE APPELLEE.

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Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE APPELLEE.

JURISDICTION.

On March 6, 1957 an indictment in thirty two counts was filed in the United States District Court for the Northern District of California, Southern Division, charging appellants with violations of Section 5861, Internal Revenue Code of 1954 (26 U.S.C. Sec. 5861). Appellant von Eichelberger was charged in counts one to eight with failure to pay the tax imposed by Section 5811 IRC (26 U.S.C. Sec. 5811) on transfers of

firearms; in counts 9 to 16 with transferring firearms not in pursuance of a written order as provided by Section 5814 IRC (26 U.S.C. Sec. 5814); and in counts 17 to 24 with possession of firearms which had been unlawfully transferred to him in violation of Section 5851 IRC (26 U.S.C. Sec. 5851).

Appellant Terzian was charged in counts 25 to 32 with possession of firearms which had been illegally transferred to him in violation of Section 5851, IRC (26 U.S.C. Sec. 5851) (Tr. 19-23, Vol. 1).

Appellants waived trial by jury and were tried on April 29 and 30, 1957 before Chief Judge Michael J. Roche and found guilty as charged to all counts, except as to counts 3, 11 and 19 which were dismissed as to appellant von Eichelberger and count 27 which was dismissed as to appellant Terzian (Tr. 24-26, Vol. 1, Tr. 84, Vol. 2).

Judgment was imposed on May 28, 1957 wherein appellant von Eichelberger was sentenced to imprisonment for six months and fined $100 on each count for a total fine of $2,100, and appellant Terzian was sentenced to imprisonment for six months and fined $100 on each count for a total fine of $700 (Tr. 24-26, Vol. 1).

Notice of appeal was timely filed on May 29, 1957 (Tr. 42-44, Vol. 1). Jurisdiction of this court is invoked under Title 28 United States Code, Sections 1291, 1294; Title 26 U.S.C. Sec. 7804; Title 18 U.S.C. Sec. 3231; and Rules 18 and 37(a), Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

The indictment herein, in 32 counts, relates to eight submachine guns originally obtained by appellant von Eichelberger from various sources and sold by him to appellant Terzian on December 5, 1956. The first eight counts charge appellant von Eichelberger with transfer of the guns to appellant Terzian without payment of the $200 transfer tax imposed by Section 5811, Internal Revenue Code; the second eight counts charge transfer of the guns without a written order as prescribed in Section 5814, Internal Revenue Code; the seventeenth to twenty-fourth counts charge appellant von Eichelberger with possession of the guns illegally transferred to him in violation of Section 5851, Internal Revenue Code; and the last eight counts charge appellant Terzian with possession of the guns illegally transferred to him by appellant von Eichelberger in violation of Section 5851, Internal Revenue Code. The penalty for all of the foregoing violations is contained in Section 5861, Internal Revenue Code.

The facts in the case are largely undisputed. Appellants stipulated that they were not importers, manufacturers or dealers in firearms; that the guns in question were firearms within the meaning of the statute[1]; and that no order forms were submitted as required by Section 5814, Internal Revenue Code (Tr. 36-38, Vol. 1; Tr. 32-33A, Vol. 2).

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[1]Despite this stipulation, the court dismissed counts 3, 11, 19 and 27 upon a showing that the agents were unable to field test the weapon described in those counts for automatic firing (Tr. 76-84, Vol. 2).

Appellant von Eichelberger was formerly proprietor of the Far West Hobby Shop, dealing with firearms of all types, and also maintained a private collection of firearms. Both appellants were generally familiar with the statutes regulating dealings in guns, and appellant von Eichelberger had on various occasions acted as a consultant for the Treasury Department in matters relating to firearms. (Tr. 43-44; 47; 70-75; 93-97; 117-121; 128-129; 138, Vol. 2). Appellants had prior dealings in firearms between them going back over a period of eight years (Tr. 97, Vol. 2).

Appellant von Eichelberger sold a quantity of firearms, including the eight described in the indictment, to appellant Terzian for $300 on December 5, 1956. (Tr. 97, 132-133, Vol. 2). The estimated market value of these guns was $3000, and von Eichelberger admitted that he knew the transfer tax on the fifteen guns involved in the transaction would aggregate $3000 and that he was responsible for the payment of this amount, but that he had no money to pay the tax. (Tr. 123-126, Vol. 2).

Both appellants knew the machine guns in question were subject to the provisions of the National Firearms Act and in violation of the statutes regulating the taxation, transfer, possession and registration of firearms (Tr. 50, 64, 70-75; 103, 115, Vol. 2).

Appellant Terzian took physical possession of the firearms on December 5, 1956, and the appellants testified that they entered into a "Conditional Sales Contract" on the same date (Tr. 98-102; 111-112;

131-133, Vol. 2). The so-called "Conditional Sales Contract" provides as follows (Def. Ex. A):

> "This agreement made between Harry von Eichelberger and Haig Terzian this day of December 5th, 1956, as follows:
>
> (1) Haig Terzian has bought from Harry von Eichelberger and Harry von Eichelberger has sold to Haig Terzian 14 machine guns and misc. parts.
>
> (2) Haig Terzian agrees to pay Harry von Eichelberger $300.00 for said guns and misc. parts; $25.00 down; $100.00 before January 15th 1957 and the balance before June 1, 1957.
>
> (3) Title to said guns shall remain in Harry von Eichelberger's name until the full price of $300.00 shall be paid. Possession only is transferred to Haig Terzian at this time.
>
> In the event that Haig Terzian fails to pay the balance of the purchase price, Harry von Eichelberger shall have the right to regain possession of said guns and misc. parts."

Pursuant to this agreement, Terzian paid $25.00 by check on December 5, 1956 and $50 each on January 5 and 9, 1957 (Tr. 59-62; 98-99, Vol. 2, Ex. 10, Def. Ex. B).[2] The $175 balance of the purchase price was not yet due and had not been paid at time of trial (Tr. 114-115; 132, Vol. 2).

In a signed statement given to agents of the Alcohol and Tobacco Tax Division on February 20, 1957, appellant von Eichelberger admitted the "sale" of the

[2]The checks in Exhibit B are dated January 5 and January 9, 1956, but it is conceded that both were drawn in 1957.

various guns and made no reference to a conditional sales agreement (Tr. 123, Vol. 2, Ex. 11).

In his first statement to the investigators on February 14, 1957 appellant Terzian asserted that he had bought the various guns singly or in twos or threes and specified the prices paid for the various guns. (Tr. 50-54, Vol. 2, Ex. 13). No reference was made to a conditional sales contract on that occasion. (Tr. 56, Vol. 2). However, in a later statement on February 18, 1957 appellant Terzian told Agent Howland that his previous statement was not correct, and changed his statement to conform to his trial testimony (Gov't Ex. 9, Tr. 56-59, Vol. 2). The principle change in the second statement was that he had bought the guns all at once for an agreed price of $300 and had paid $125 toward the purchase price (Tr. 58, Vol. 2).

On cross-examination appellant Terzian admitted that he was free to store the guns any place he wished (Tr. 134, Vol. 2). Appellant von Eichelberger admitted that he did not know what Terzian did with the guns once he had taken them home. (Tr. 114, Vol. 2).

In early February, 1957 (fixed as the 3rd or 4th day of the month by appellant Terzian) the firearms were taken by Terzian in a box or boxes, with one weapon wrapped in a blanket, to a garage on the premises at 80 Julian Street, San Francisco for storage (Tr. 16-17; 131-136, Vol. 2). The garage premises were in an apartment-rooming house where the witness Trost resided, and were in Trost's exclu-

sive possession. The only access to the garage was through a single door which was kept locked at all times, and to which only Trost had the key. (Tr. 13-19, Vol. 2). At Terzian's request, Trost permitted him to store the boxes of machine guns and the blanket-wrapped rifle in the garage. Trost knew a rifle was wrapped in the blanket, but he did not know what was in the boxes. (Tr. 15-18, Vol. 2). Trost told Terzian he would give him a key to the garage and he had one made for that purpose, but it was defective and was not delivered to Terzian (Tr. 18, Vol. 2). Trost used the garage for storage of various items connected with his parking lot business located across the street. (Tr. 18-19, Vol. 2).

Trost did not know appellant von Eichelberger (Tr. 14, Vol. 2) and von Eichelberger did not know of or arrange for the storage of the guns on Trost's premises (Tr. 113, Vol. 2).

Appellant Terzian admitted that he could enter the garage only with Trost's permission, and by use of Trost's key; that he did not live on the premises, and that he paid nothing for the use of the storage space (Tr. 132-136, Vol. 2).

About a week after the boxes had been stored in his garage, Trost observed Terzian's picture in the newspaper and thereupon called at the Bureau of Narcotics where he informed Agent Trainor of the circumstances of the storage of the boxes. Trost and three agents of the Bureau of Narcotics returned to the premises at 80 Julian Street where Trost unlocked the garage door and pointed out the boxes. The boxes

were opened then taken away with their contents by the Narcotics Agents (Tr. 21-25; 34-39, Vol. 2). The action of the Narcotic Agents was with the consent and cooperation of Trost. (Tr. 24, 39, Vol. 2).

On cross-examination Trost testified that he did not have Terzian's permission to open the boxes, and it was stipulated that no search warrant had been issued. (Tr. 25-29, Vol. 2).

Appellant von Eichelberger testified that he had acquired the four guns, being Exhibits 1, 2, 4 and 8, in 1945 while employed at the Far West Hobby Shop; that he purchased them for $800 from an individual wearing an Air Force uniform, and representing himself to be the personal pilot for Prime Minister Winston Churchill; that he did not obtain an order blank from the seller; that no tax was paid on the transfer of the guns to him; and that he did not register the guns with the Alcohol and Tobacco Tax Division, although aware he was required to do so. (Tr. 104-105; 115, Vol. 2).

von Eichelberger further testified he obtained the machine gun in evidence as Exhibit 5 from a Navy Captain for $75 about 1949 at San Francisco. (Tr. 105-108; 116, Vol. 2), and that Exhibits 6 and 7 were purchased for $175.00 in 1950 from a Navy Lieutenant Commander who refused to give his name. (Tr. 108-110; 116-117, Vol. 2). He admitted that no order blank was made as required by Section 5814; no tax was paid on the transfer of the guns as required by Section 5811, and none of the guns were registered by him with the Alcohol and Tobacco Tax

Division, although he knew of these requirements of the law. (Tr. 115-120, Vol. 2).

STATUTES INVOLVED.

The statutes involved are set forth in the appendix.

QUESTIONS PRESENTED.

1. Whether the sale and delivery of firearms pursuant to a conditional sales contract constitutes a "transfer" within the meaning of the definition contained in Section 5848(10), Title 26, United States Code.

2. Whether Section 5846, Title 26, United States Code, incorporating other provisions of the Internal Revenue Code by reference, is applicable so as to alter, modify or amend provisions of the Internal Revenue Code regulating dealings in firearms.

3. Whether the statute of limitations has barred prosecution of appellant von Eichelberger on counts 17 to 24 of the indictment.

4. Whether the search of a garage with the consent of the legal occupant, and the seizure of contraband firearms stored therein by appellant Terzian, constitutes an unreasonable search and seizure in violation of appellant's rights under the Fourth Amendment.

SUMMARY OF ARGUMENT.

I.

By including the words "or otherwise dispose of" in the definition of "transfer" as applied to dealings in firearms under Section 5848(10), Title 26, United States Code, Congress intended to regulate the physical transfer of firearms from one person to another, irrespective of the transfer of legal title. Accordingly, machine guns sold on a conditional sales contract and physically transferred from the seller to the buyer constitute transfers within the meaning of the statute. In addition, a conditional sale falls within the scope of the general term "to sell" as defined under "transfer" in the statute, and failure of Congress to include the term "conditional sale" under the definition of "transfer" does not indicate an intent to exempt such transfers from the operation of the statute.

II.

The statutes defining the duties of persons dealing in firearms, and setting forth penalties for violation of such duties, are clear and precise. The indictment herein charges violations of the pertinent sections of the Internal Revenue Code without reference to any matters incorporated by inference from other portions of the Code. Whatever else be the effect of Section 5846, Title 26, United States Code (in applying provisions of other internal revenue laws not inconsistent with those in Chapter 53 dealing with firearms), it clearly does not alter, amend or modify the duties and penalties for evasion of such duties

set forth unequivocally in the chapter dealing specifically with firearms. In any event, appellants have failed to allege or prove that they were in any way misled or confused as to the meaning of the statutes involved, but to the contrary have conceded that they were aware of the law and simply failed to follow its dictates.

III.

The gist of the offense charged in counts 17 to 24, inclusive, is the possession of firearms within the period of the statute of limitations. Section 5851, Title 26, United States Code makes it unlawful to possess a firearm which has at any time been transferred in violation of the provisions of Sections 5811 or 5814, Title 26, United States Code. Concededly, appellant von Eichelberger possessed within the period of the statute of limitations certain firearms unlawfully transferred to him. That he received these firearms unlawfully in 1950 and earlier does not bar his prosecution for possession during the period of the statute of limitations. In general, the statute of limitations does not apply when some portion of the crime is within the period, although another portion is not. To hold that the statute of limitations began to run upon the unlawful receipt of the weapons insofar as prosecution under Section 5851 is concerned, would permit a defendant to escape the requirements of the law by the mere expedient of concealing his wrongdoing for the period of the statute of limitations. That this was not the intent of Congress is shown by the language of the statute

prohibiting possession "at any time" of illegally transferred firearms.

IV.

The search of a garage in which appellants had no interest, and the seizure of contraband firearms with the consent and by the invitation of the legal occupant of the premises, did not violate the rights of either appellant under the Fourth Amendment. The evidence was not taken from appellants, but from a third party who voluntarily relinquished it. Moreover, the place searched was a garage and therefore not within the protection of the Fourth Amendment. Finally, the evidence seized was contraband and appellants have failed to show that they, or either of them, had sufficient interest in the premises searched or the property seized to complain of the seizure.

ARGUMENT.

I.

THE SALE AND DELIVERY OF FIREARMS BETWEEN APPELLANTS CONSTITUTES A "TRANSFER" OF MACHINE GUNS WITHIN THE MEANING OF THE STATUTE REGULATING SUCH TRANSFER.

Appellants' opening argument is that the sale and delivery of the firearms in question does not constitute a "transfer" as that term is defined in Section 5848(10), Title 26, United States Code, and that therefore they were not required to comply with the requirements of Section 5811 and 5814, Title 26, United States Code, regulating such transfers.

Section 5811(a), Title 26, United States Code imposes a tax of $200 on firearms "transferred" in the United States; the tax to be paid by the transferor (subsection (b)); and to be represented by stamps (subsection (c)).

Section 5814(a), Title 26, United States Code makes it unlawful for any person to "transfer a firearm except in pursuance of a written order from the person seeking to obtain such article" on an order form issued in blank for such purpose by the Secretary [of the Treasury] or his delegate.

The term "transfer" is defined in Section 5848(10), Title 26, United States Code as follows:

> "(10) To transfer or transferred.—The term 'to transfer' or 'transferred' shall include to sell, assign, pledge, lease, loan, give away, or otherwise dispose of."

It is appellant's contention that since the guns in question were transferred from appellant von Eichelberger to appellant Terzian pursuant to a so-called "conditional sales agreement," which method of transfer is not expressly included in the definition contained in Section 5848(10), such transfers are excluded from the operation of the statute.

Briefly, the facts show that appellants negotiated on December 5, 1956 for the sale of a quantity of machine guns and miscellaneous parts, including the eight guns described in the indictment; that appellant Terzian paid $25.00 down and agreed to pay the balance of the $300 purchase price in installments;

that appellant Terzian received physical custody and possession of the guns immediately upon the payment of the $25.00, and that he retained exclusive custody of the guns thereafter.

The broad Congressional intent to prohibit the physical transfer of firearms except in accordance with the provisions of Chapter 53, Internal Revenue Code, is amply demonstrated by the use of the words "or otherwise dispose of" in the definition of the word transfer in Section 5848(10). The method of handling the machine guns adopted by appellants, whether or not falling within the technical legal definition of "sale," nevertheless constitutes a transfer from von Eichelberger to Terzian under the broad phrase "or otherwise dispose of." It would be a perversion of the congressional intent to permit appellants by use of legal semantics to avoid the logical and reasonable intendments of the statute.

Moreover, it is believed that the machine guns were transferred as sold within the meaning of the word "to sell" in Section 5848(10). Under California law, "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." California Civil Code, Section 1721(2). "Sell" is not a word of fixed and invariable meaning, but may be given a narrow or broad meaning, according to the context or the surrounding circumstances. *W. F. Boardman Co. v. Petch,* 199 P. 1047, 186 C. 476. A sale may be conditional or absolute. (California Civil Code, Section 1721(3)) and will generally be given

a broader significance where the meaning of the law demands it. *Mansfield v. District Agr. Ass'n No. 6,* 97 P. 150, 154 C. 145.

It is clear that Congress intended to regulate the physical transfer of firearms, irrespective of whether legal title passed with the weapons or remained in the transferor. No other logical conclusion is possible in view of the definition of "transfer" in Section 5848(10). If it were intended that both possession and legal title must pass to complete a transfer, there would appear no valid reason for including assignments, pledges, leases, and loans of firearms as transfers, since in all such circumstances title remains in the assignor, pledgor, lessor or lender. The interpretation of the statute argued for by appellants would frustrate the Congressional motive to prevent racketeers, bank robbers and desperadoes from obtaining machine guns and other firearms, and to enable the federal government to trace the ownership of firearms. *United States v. Adams,* 11 F. Supp., 216 (D.C. Fla., 1935).

That passage of physical possession rather than legal title is the touchstone of the offense is further demonstrated by decisions of two circuits that possession of *stolen* guns, constitute offenses when they have not been properly transferred in compliance with the statutes here involved. *Montgomery v. United States,* 146 F. 2d 142 (C.A. 4th, 1944); *Rayborn v. United States,* 234 F. 2d 368 (C.A. 6th, 1956). Certainly if a theft of a firearm constitutes a taxable transfer within the meaning of the statute, the sale

of guns, whether conditional or absolute, and the physical transfer of possession from the transferor to the transferee falls within the scope of transfers intended to be regulated.

II.

THE STATUTES ARE CLEAR AND UNAMBIGUOUS IN DEFINING APPELLANTS' DUTIES AND IN PROVIDING PENALTIES FOR VIOLATIONS OF SUCH DUTIES.

Appellants suggest that Section 5846, Title 26, United States Code making applicable all provisions of law with respect to taxes on narcotic drugs, and all other provisions of the internal revenue laws "insofar as not inconsistent with the provisions of this Chapter" incorporates various other sections of the Internal Revenue Code to such a degree that the statute is not sufficiently definite to satisfy procedural due process (App. Br. 19-23).

Appellants' argument is ingenious but without merit. Section 5846 in no way alters, amends or modifies the requirements set forth in Chapter 53 of the Internal Revenue Code for dealing with firearms. Nor are appellants charged in the indictment with any offenses incorporated by reference from other chapters of the Internal Revenue Code. The indictment is a plain, concise and definite written statement of the offenses charged under Section 5861, Title 26, United States Code, and clearly alleges failure to comply with Section 5811 relating to payment of the transfer tax, Section 5814 relating to transfer pursu-

ant to a written order, and Section 5851 relating to possession of firearms unlawfully transferred.

In short, the statutes under which appellants are charged define specific duties and provide specific penalties for violation of such duties. There is no ambiguity in Sections 5811, 5814 or 5851 defining the duties and no doubt as to the penalties contained in Section 5861 for violation of such duties. The Constitution requires no more. The standard employed by the Supreme Court in reviewing penal statutes for certainty is whether they convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. *United States v. Petrillo,* 332 U.S. 1, 8.

Appellant has quoted from *United States v. Harris,* 347 U.S. 612, at page 617 (App. Br. 22) defining the constitutional requirement for definiteness in a criminal statute, but has neglected to include the paragraph following his printed excerpt. At page 618 the Court continues:

> "On the other hand, if the general class of offenses to which the statute is directed is plainly within the terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States v. Petrillo,* 332 U.S. 1, 7. *Cf. Jordan v. DeGeorge,* 341 U.S. 223, 231. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this court is under a duty to give the statute that construction. This was the course adopted in *Screws v. v. United States,* 325 U.S. 91, upholding the definiteness of the Civil Rights Act."

The rule as to statutes charged with vagueness is but one aspect of the broader principle that the Court, if fairly possible, must construe Congressional enactments so as to avoid a danger of unconstitutionality. *United States v. Delaware & Hudson Co.,* 213 U.S. 366, 407-408; *United States v. Congress of Industrial Organizations,* 335 U.S. 106, 120-121; *United States v. Rumely,* 345 U.S. 41, 47.

Cases cited by appellants are inapposite, for in those cases the Court was called upon to examine into the definiteness of the precise statutes under which the defendants in each case were charged. Appellants here make no claim that the statutes under which they were charged are in any way vague or indefinite. Their sole claim is that Section 5846, which they have seized upon and injected into the case without showing they were misled thereby, somehow beclouds the otherwise clear course of conduct chartered in Chapter 53, Internal Revenue Code.

While appellants pose certain hypothetical questions in an effort to show that the statute is vague and misleading, they fail to show and do not claim that they were at any time misled as to their duties and responsibilities under the statute or that they attempted to chart a course which would comply with their understanding of the law. To the contrary, the evidence clearly shows that they were fully aware of the requirements that a tax be paid on the transfer of firearms; that an order form be prepared; and that the guns be registered (Tr. 115-118, 138, Vol. 2). Appellant von Eichelberger (who as transferor was

liable for the tax) admitted on cross-examination that the reason the order forms were not made out and the tax not paid was that he was financially unable to pay it (Tr. 122, Vol. 2). This is understandable, since the guns were sold by him for $300 and the tax would have ranged from $1600 to $3000 depending on the number of weapons qualifying as firearms under the statute (Tr. 122, Vol. 2).

Section 5846 has no application to the charges contained in the indictment here and does not in any respect affect the statutes under which the indictment was returned.

III.

PROSECUTION OF APPELLANT VON EICHELBERGER ON COUNTS 17 TO 24 WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Appellant von Eichelberger contends that the statute of limitations (Section 6531, Title 26 United States Code) bars prosecution on counts 17, 18, 20, 21, 22, 23 and 24.[3] In these counts it is charged that appellant von Eichelberger "on or about the 5th day of December, 1956 and prior thereto, . . . did receive and possess" certain described machine guns which had been transferred to him in violation of Sections 5811 and 5814, Internal Revenue Code (Sections 5811 and 5814, Title 26, United States Code).

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[3]Appellant assumes that the statute of limitations is six years, while we perceive it to be three years. Irrespective of which is correct, we concede that the statute of limitations has barred prosecution if appellant's theory is adopted.

The unlawful receipt or possession of a firearm is proscribed by Section 5851, Title 26, United States Code, which provides in part:

> "It shall be unlawful for any person to receive or possess any firearm *which has at any time* been transferred in violation of Sections 5811, . . . 5814, . . . Whenever on trial for a violation of this section the defendant is shown to *have or to have had possession* of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury." (Italics supplied)

The penalty for violations of the above-quoted section is contained in Section 5861, Title 26 United States Code.

It is appellant von Eichelberger's contention that since his uncontradicted, but uncorroborated, oral testimony established that the machine guns in question were transferred to him prior to 1950, (concededly in violation of Sections 5811 and 5814) his criminal liability accrued from the dates of transfer and earlier than six years prior to the return of the indictment.

The evidence shows, and appellant von Eichelberger admitted, that he possessed the firearms in question on December 5, 1956, the date set forth in the indictment, and prior thereto (Tr. 97, 102, Vol. 2). That is the gist of the offense. In his argument appellant misconceives the nature of the charge against him in counts 17 to 24. He is not charged with failure to

pay the transfer tax or failure to use the order form in counts 17 to 24;—he is charged with *possession* of guns transferred to him without compliance with those provisions of the Internal Revenue Code. The statutory language clearly prohibits the present possession of a firearm thus unlawfully transferred, irrespective of the date of transfer. Any other construction would make meaningless the phrase "possess any firearm which has *at any time* been transferred" in Section 5851. The intent of Congress to prohibit possession of illegally transferred firearms is further evidenced by the presumption contained in Section 5851 and containing the language "Whenever . . . the defendant is shown *to have or to have had* possession . . . " of illegally transferred firearms, such possession is sufficient to convict.

Concededly, prosecution for possession at a time earlier than three years prior to the return of the indictment would be barred by the statute of limitations. However, that is not the situation here, for the indictment was returned on March 6, 1957, only three months after the firearms were relinquished by appellant (Tr. 2, Vol. 1). Clearly, the possession of the firearms was well within the period allowed for institution of criminal proceedings. For, in general, the statute of limitations does not apply when some portion of the crime is within the period, although another portion thereof is not. 22 C.J.S. Criminal Law, Sec. 227.

The Courts do not appear to have been called upon to determine when the statute of limitations starts to

run under Section 5851, Internal Revenue Code. It is clear, however, that the possession of firearms unlawfully transferred is a separate and distinct offense from failure to pay the transfer tax, failure to use order forms, or possession of unregistered firearms. See, e.g.: *United States v. Hardgrave,* 214 F.2d 673 (C.A. 7th, 1954); *Montgomery v. United States,* 146 F.2d 142 (C.A. 4th, 1944); *Wright v. United States,* 243 F.2d 546 (C.A. 6th, 1957); *Rayborn v. United States,* 234 F.2d 368 (C.A. 6th, 1956).

Appellants' argument that his obligations and duties were fixed upon the transfer and receipt of the guns prior to 1950 finds no support in the foregoing cases, for they clearly consider the offenses to be separate and distinct ones. That the time and manner of original acquisition of the firearms is considered of no consequence is demonstrated by the *Rayborn* and *Montgomery* cases, supra, each of which dealt with prosecution for receipt and possession of firearms which had been stolen by the defendant. In neither case does the Court consider the dates of theft, but only whether the subsequent possession without compliance with the statutes constitutes properly charged offenses.

Applying the presumption contained in Section 5851, Title 26 United States Code to the facts here, it is uncontradicted that the appellant had had possession of the firearms described in the indictment within the period of the statute of limitations. In the absence of satisfactory explanation, such possession alone was sufficient evidence to support the conviction.

Finally, the argument advanced by appellants would frustrate the clear intent of Congress to control the traffic in deadly weapons such as machine guns, to limit the possession of such guns to qualified citizens, and to maintain a record of the persons who had such weapons in their possession. With such intent in mind, it is necessary to construe the offense as being committed during all times that the unlawful possession occurred. To hold that the offense was completed at the time of securing of the weapon, and that subsequent concealment for the period of the statute of limitations would relieve the possessor of the requirement to comply with the law, would reduce the situation to an absurdity. By its very nature, the act of possession in violation of the statute was a continuing one until such time as the weapons left the hands of the appellants. This occurred on December 5, 1956 and the statute of limitations began to run on that date alone.

IV.

THE SEARCH OF TROST'S GARAGE AND THE SEIZURE OF THE CONTRABAND FIREARMS DID NOT VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS.

Appellants contend that since they failed to give permission to the investigating agents to enter Trost's garage, and since no search warrant was issued, the search was unreasonable and the evidence thus obtained, consisting of the machine guns in question, was inadmissible against them. The government con-

tends that the case does not involve any search and seizure, illegal or otherwise.

a. The Search Was With the Consent of the Legal Occupant of the Premises.

At the outset it is clear that neither appellant had any authority to either grant or deny permission to enter Trost's garage. The premises were entirely under Trost's control; only Trost had the key; only Trost paid the rent; and only Trost was able to give permission to the agents to enter the garage (Tr. 13-19, 113-114; 132-133, Vol. 2). That the entry of the agents into Trost's garage was with his consent and by his invitation is conceded by appellants (App. Br. 27). No further permission was needed.

Appellants cannot complain that the incriminating evidence was taken from a third party—Trost, who willingly and voluntarily surrendered it to the agents (Tr. 23, Vol. 2). As this Court said in *Remmer v. United States,* 205 F.2d 277, 285, (reversed on other grounds 347 U.S. 227 and 350 U.S. 377): "The records . . . were obtained by the government from third parties rather than from appellant. Use of such records by the prosecution would not violate appellant's constitutional rights, even were it true that the third parties originally obtained the records from appellant illegally."

It has been held that a search without a warrant, but with consent of the person left in charge by the owner is lawful, (*United States v. Walker,* 197 F.2d 287 (C.A. 2d, 1952); cert. denied, 344 U.S. 877;

Raine v. United States, 299 Fed. 407, 411 (C.A. 9th, 1924); cert. denied, 266 U.S. 611), and that consent by a joint tenant, when the defendant and the consenting party both had free access to a garage, is not an "unreasonable" search and seizure (*Driskill v. United States,* 281 Fed. 146 (C.A. 9th, 1922). To hold otherwise in this case, where only the consenting party (Trost) had free access to the premises; where the premises consisted of a garage; where no trespass, force, coercion or influence was employed by agents; and where the agents were invited to make a search, would "be to make of the constitutional provision a fetish, instead of a shield against the invasion of personal and property rights." *Driskill v. United States,* 281 Fed. 146 (C.A. 9th, 1922).

b. Appellants Have No Interest in the Place Searched Sufficient to Give Them Standing to Complain.

Appellant Terzian claims a "right to possession" of the firearms, and a "license" in the premises on which they were stored as a result of Trost's permission to use the premises for this sole purpose; and appellant von Eichelberger claims "ownership" of the guns (App. Br. 26). These claims are obviously an effort to establish some interest in the place searched and the property seized in order to bring appellants within the protection of the Fourth Amendment. It is axiomatic that if no rights of a defendant were disturbed, he is not aggrieved by an illegal search and seizure and cannot complain of the things seized in such a search being used against him. *United States v. Lee Hee,* 60 Fed. 2d 924, 926 (C.A. 2d, 1932). The privi-

lege cannot be claimed where the defendant disclaims ownership of the property seized, as appellant Terzian has done.

Ingram v. United States, 113 F.2d 966, 968 (C.A. 9th, 1940);

Driskill v. United States, 281 F. 146, 147 (C.A. 9th, 1922);

Kwong How v. United States, 71 F.2d 71, 75 (C.A. 9th, 1934).

Nor is mere physical custody of incriminating evidence enough to entitle one to invoke protection of the Fourth Amendment. *United States v. Mandell,* 17 F.2d 270, 273 (D.C. Mass., 1927).

This Court in *Kwong How v. United States,* 71 F.2d 71, 75 (1934) quoted with approval from *Kelley v. United States,* 61 F.2d 843, 846 (C.A. 8th, 1932) the following language:

> "The question seems well settled . . . that one who is not the owner, lessee, or lawful occupant of the premises searched cannot raise the question under the Fourth Amendment of unlawful search and seizure."

The most appellant Terzian claims is a "license" to use the property as a result of Trost's permission to store boxes in the garage. This is clearly inadequate to give him standing to complain of a search of the premises and if allowed would extend the Constitutional protection to an extreme not previously envisioned. The result of such reasoning would be to require search warrants in every instance in which

the officers were unable to obtain consents to search from persons claiming some right or title in the property searched irrespective of whether they occupied the property. The absurdity of such logic is shown if instead of a private garage, the articles had been stored in a public warehouse.

Appellant von Eichelberger's argument is even more tenuous, for he is, in effect, contending that the protection of the Fourth Amendment follows the legal title in seized property, irrespective of who has custody or possession. He cites no cases for this proposition, and we have found none.

c. The Premises Seached, Consisting of a Garage, Fall Outside the Protection of the Fourth Amendment.

Even assuming, arguendo, that appellants have shown sufficient interest in the property seized to satisfy the Court, the premises searched, consisting of a garage, do not fall within the term "house" as used in the Fourth Amendment. *Carney v. United States,* 163 F.2d 784, 787 (C.A. 9th, 1947); cert. denied, 332 U.S. 824. Cf. *United States v. McBride,* 284 Fed. 416; cert. denied, 261 U.S. 614; *Hester v. United States,* 265 U.S. 57.

In *Martin v. United States,* 183 F.2d 436 (C.A. 4th, 1950), a garage was searched and untaxed liquor was found therein. A motion to suppress the evidence there obtained was denied. In *Johnson v. United States,* 199 F.2d 231 (C.A. 4th, 1952) a whole farm, including a truck outside the house, and a garage were

searched, and the Court held that such a search was reasonable.

In *Earl v. United States,* 4 F.2d 532 (C.A. 9th, 1925), the search was of a garage in the basement of a dwelling house, with which it was wholly unconnected, and which was leased to and occupied by other tenants. The Court held that the garage was not a "house" within the protection of the amendment. To the same effect are *Vaught v. United States,* 7 F.2d 370 (C.A. 9th, 1925) and *Gay v. United States,* 8 F.2d 219, 220 (C.A. 9th, 1925) where it was held that no search warrant was necessary for a garage.

If, as appears, appellants concede that the search of the garage was lawful, but contend that the subsequent search of the boxes containing the firearms was an invasion of their Constitutional rights (App. Br. 27) they are attempting to extend the protection of the Fourth Amendment to unreasonable extremes. None of the cases even remotely suggest the possibility that once a lawful entry has been gained, a search for contraband becomes unreasonable because it is not found in plain sight. To follow petitioners' reasoning to its illogical result would require the conclusion that a search warrant is needed in every case in which evidence is concealed. It would, for example, require a search warrant to break open a sealed envelope in which narcotics were contained. The Fourth Amendment does not compel such absurd results.

Petitioners cite *Marron v. United States,* 275 U.S. 192 as authority for this proposition, but the case is

inapposite. In that case the officers seized books and records which were not described in the search warrant, but which were admitted into evidence. The resulting conviction was affirmed by this Court and the Supreme Court.

Nor is *United States v. Jeffers,* 342 U.S. 48, cited by petitioners applicable to the facts here. In that case the initial entry of the officers into the hotel room of defendant's aunts was a trespass, whereas the entry here was by invitation of the occupant.

Clearly, no constitutional right of either appellant was violated and the evidence was properly admitted against them.

d. The Weapons Were Properly Seized as Contraband.

Finally, the firearms in question were subject to seizure and forfeiture pursuant to Section 5862 of Title 26, *United States Code.* The Supreme Court recognizes that a search for contraband presents a different problem than one which has as its object the private papers or effects of the defendant. *Boyd v. United States,* 116 U.S. 616, 624; *Davis v. United States,* 328 U.S. 582; *Harris v. United States,* 331 U.S. 145, 155. No agent of the United States is required to stand passively by while a crime is being committed in his presence. When the agents discovered the cache of machine guns they could not be expected to turn on their heels and walk out. It became their plain duty to seize the contraband, and no rule of evidence or constitutional privilege can bar the use of this

evidence to convict the defendants. It must be remembered that "a criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire v. United States,* 273 U.S. 95, 97.

e. The Search and Seizure Was a Reasonable One.

The Fourth Amendment prohibits only "unreasonable" searches and seizures. The question of reasonableness is one peculiarly within the province of the trial judge. The trial judge is in a position to know the total atmosphere of the case. His determination of reasonableness should not be disturbed if fairly supported by the evidence. *Shelton v. United States,* 197 F.2d 827, 828 (C.A. 5th, 1952); *Davis v. United States,* supra, *Martin v. United States,* supra, "The test of reasonableness cannot be stated in rigid and absolute terms. It cannot be determined by any fixed formula; the recurring questions of the reasonableness of search must find resolution in the facts and circumstances of each case." *Harris v. United States,* supra. The government submits that under all the facts and circumstances the search and seizure in this case, if it be a search and seizure, was a reasonable one.

CONCLUSION.

For the reasons hereto set forth, it is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
October 18, 1957.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

JOHN LOCKLEY,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1954 (Title 26, United States Code):

Sec. 5811. Tax.

(a) Rate. There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200 for each firearm: *Provided,* That the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, or any gun designed to be held in one hand when fired and having a barrel 12 inches but less than 18 inches in length from which only a single discharge can be made without manual reloading, shall be at the rate of $1. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

(b) By Whom Paid. Such tax shall be paid by the transferor.

(c) How Paid.

(1) Stamps. Payment of the tax herein provided shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

Sec. 5814. Order Forms.

(a) General Requirements. It shall be unlawful for any person to transfer a firearm except in pur-

suance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Secretary or his delegate. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this chapter: *Provided,* That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) Contents of Order Form. Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Secretary or his delegate. The original thereof, with stamp affixed, shall be returned to the applicant.

(c) Documents to Accompany Transfers. No person shall transfer a firearm unless such person, in addition to complying with subsection (b), transfers therewith (in compliance with such regulations as may be prescribed under this chapter for proof of payment of all taxes on such firearm)

(1) for each prior transfer of such firearm which was subject to the tax imposed by section 5811(a), the stamp-affixed order provided in this section, and

(2) for any making of such firearm which was subject to the tax imposed by section 5821(a), the stamp-affixed declaration provided in section 5821.

Sec. 5846. Other Laws Applicable.

All provisions of law (including those relating to special taxes, to the assessment, collection, remission, and refund of internal revenue taxes, to the engraving, issuance, sale, accountability, cancellation, and distribution of taxpaid stamps provided for in the internal revenue laws, and to penalties) applicable with respect to the taxes imposed by sections 4701 and 4721, and all other provisions of the internal revenue laws shall, insofar as not inconsistent with the provisions of this chapter, be applicable with respect to the taxes imposed by sections 5811(a), 5821(a) and 5801.

Sec. 5848. Definitions.

For purposes of this chapter—

(10) To Transfer or Transferred. The term "to transfer" or "transferred" shall include to sell, assign, pledge, lease, loan, give away, or otherwise dispose of.

Sec. 5821. Possessing Firearms Unlawfully Transferred or Made.

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such

possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

Sec. 5861. Penalties.

Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than $2,000, or be imprisoned for not more than 5 years, or both, in the discretion of the Court.

Sec. 5862. Forfeitures.

(a) Laws Applicable. Any firearm involved in any violation of the provisions of this chapter or any regulation promulgated thereunder shall be subject to seizure and forfeiture, and (except as provided in subsection (b)) all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles are extended to and made to apply to the articles taxed under this chapter, and the persons to whom this chapter applies.